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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 140

EDWIN K. ATWOOD and ALICE B. ATWOOD, individually and as Conservatrix of the Estate of RICHARD W. ATWOOD, distracted,

Petitioners,

vs.

ALICE G. K. KLEBERG, individually and as Executrix, etc., et al.,

Respondents.

PETITIONERS' REPLY BRIEF TO BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents Alice G. K. Kleberg, et al., and Humble Oil & Refining Company have filed their Briefs herein, the latter adopting the Brief of the former in so far as the validity of the mineral leases is concerned.

We discuss each of the three issues considered by the Respondents' Briefs as follows:

1. The effect of the Tule (MacManus v. Anzualda) decree in rem as res judicata of the title to 127,000 mineral acres in Hidalgo and Cameron Counties, Texas.

Respondents say that the partition decree entered July 21, 1930 in the San Salvador del Tule Grant partition suit is not *res judicata* of the title to the 127,000 mineral acres there adjudicated to Robert J. Kleberg, Sr. as mineral trustee and is not a decree *in rem* binding upon the world because:

(a) Kleberg as mineral trustee was not "in fact" a party to the Tule partition suit because "an attempted intervention" was filed by his attorneys without his "authorization or knowledge," or that of the testamentary trustees under Mrs. King's Will who were represented by the same attorneys.

(b) Kleberg "could not litigate the issue" as to whether the mineral trust then existed "on account of lack of opposing parties."

(c) The beneficiaries under Mrs. King's Will were not parties to the Tule partition suit nor "in privity with them," wherefore the partition decree was not binding upon the beneficiaries.

(d) The Tule partition decree does not interpret the mineral trust "or supply any of its defects," because the Tule partition decree "vested merely the naked legal title without any power of disposition" in Kleberg as mineral trustee and "vested all of the remainder of the title to the 29/32 mineral interest in the testamentary trustees, to be dealt with by them unimpeded by any active mineral trustee."

Petitioners respectfully urge that there is no validity to any of these contentions, as we now proceed to show:

(a) It is admitted by respondents that Kleberg as mineral trustee intervened in the Tule partition suit (by Edward R. Kleberg and J. K. Wells, his attorneys). The intervention petition appears on pages 2743-53 of the Record. It was filed by "Robert J. Kleberg, Sr., Individually and in his capacity as Trustee under a certain Power of Attorney Coupled with an Interest and Declaration of Trust hereinafter more particularly set out and described, and with leave of the Court first had and obtained" (R. 2743), and it was signed "Robert J. Kleberg, Sr., by Edward R. Kleberg and J. K. Wells, his attorney(s)" (R. 2745). Attached as "Exhibit A" to the petition was the March 1, 1919 Mineral Trust (R. 2746-53).

The Record abundantly shows that Edward R. Kleberg and J. K. Wells were attorneys at law for Robert J. Kleberg, Sr., as mineral trustee. Mr. Marcellus G. Eckhardt, Jr. testified that he was an attorney associated with Edward R. Kleberg subsequent to 1926. He testified on page 3109 of the Record: "I do know that Mr. (Edward R.) Kleberg was active as an attorney in advising with some of the attorneys for the Estate (of Mrs. H. M. King) in that (Tule) land suit."

Robert J. Kleberg, Sr. was dead at the time this case was tried in the District Court, his death having occurred on October 10, 1932. The rules governing the decision of an issue as to whether attorneys, who have entered the appearance of a deceased client, did so with full authority are well settled under Texas law. The Texas cases hold that an attorney is conclusively presumed to have authority to represent and act for his client, and that full authority will be presumed on collateral attack.

Holder v. *State*, 29 S. W. 793;
Hidalgo County District v. *Magnolia*, 47 S. W. (2) 875;
Patterson v. *Rogers*, 53 Tex. 484.

It is equally well settled under Texas law that a party to a suit is conclusively deemed to know the contents of all pleadings and orders and especially of the final judgment.

31 Texas Jurisprudence 372;
Deutschmann v. *Ryan,* 148 S. W. 1140;
Hacker v. *Hacker,* 110 S. W. (2) 923;
West Lumber Co. v. *Lyon,* 116 S. W. 652;
Walet v. *Haskins,* 68 Tex. 418, 421.

The respondents' argument that Robert J. Kleberg, Sr. neither authorized nor had any knowledge of his own intervention by his own attorneys in the Tule partition suit in his capacity as mineral trustee was not supported by any evidence in the Record whatever. Neither Edward R. Kleberg nor J. K. Wells (his attorneys) was called to testify; and Robert J. Kleberg, Sr. had already died without giving any testimony in this case. No Record references were made by respondents to any such proofs for the simple and obvious reason that no such evidence exists in this case.

Respondents' argument appears to be that Kleberg, Sr. as mineral trustee did not authorize or have knowledge of the transactions of his attorneys merely because it appears from the Tule, partition decree that the same attorneys undertook to represent other parties to the proceeding. This is a complete *non sequitur.* In partition proceedings it not infrequently occurs that one attorney or firm of attorneys will represent several of the respective owners in the land subject to partition. This was pre-eminently so in the case of the Tule partition suit. A certified copy of the Final Partition Decree has been transmitted to this Court from the Circuit Court of Appeals; and a glance at this final decree will conclusively

show that many of the attorneys in that action represented various claimants in the Grant, all of whom were made defendants and whose interests were adverse in the same sense in which Robert J. Kleberg's interests as mineral trustee in the 127,000 mineral acres were adverse to all other parties claiming therein.

In other words there is no foundation in this case for the legal conclusion drawn by respondents that Robert J. Kleberg, Sr., as mineral trustee was not properly represented in that capacity in the Tule case and was not properly decreed to be the owner of the 127,000 mineral acres in the Final Partition Decree itself.

It may be true, as respondents urge on page 5 of their Brief, citing two Supreme Court cases, that a judgment of a state court can be collaterally attacked in the Federal Court for want of jurisdiction over the person of a defendant; but it has never been held, when the client is dead and the attorneys who have represented him are not called to testify, that somehow it may be presumed, in the total absence of any proof and as a matter of law, that the client gave no authorization and had no knowledge of the proceedings taken in his name and on his behalf by his attorneys in said proceedings. If this were the law, any decree could be collaterally attacked by the simple device of denying, without proof, that the client authorized or knew of his attorney's actions and representation in the case.

(b) Respondents' argument that Kleberg as mineral trustee could not litigate an issue with himself as residuary trustee, and that there was therefore a "lack of opposing parties," certainly cannot be sustained. None of the authorities cited in respondents' Brief (p. 6) so

holds. The first four cases there cited held that a *guardian* could not litigate his individual rights in the property of his wards *without another representative of the minors being made a party to the proceedings.* The balance of respondents' authorities discuss the question of jurisdiction over the persons of the parties to the judgment. No such issue was raised here, where Kleberg as mineral trustee intervened by his own attorneys to claim 127,000 mineral acres as against many other defendants, including seven co-trustees under Mrs. King's Will (one of whom was himself), who had likewise intervened by their attorneys in the same proceedings and were claiming the "surface" title to the same lands from which the minerals had been severed and conveyed eleven years earlier to Kleberg as mineral trustee. In other words, Kleberg as mineral trustee was claiming *minerals;* whereas the seven testamentary trustees (including Kleberg) were claiming "surface" lands *without minerals,* all in the same grant. A clearer showing of "adversary parties" could hardly exist.

(c) Respondents' contention that the beneficiaries under Mrs. King's Will were not in privity with the parties to the Tule partition suit cannot be sustained. Mrs. King during her lifetime, and her residuary trustees after her death, and Kleberg as the mineral trustee of her minerals were all parties to the Tule partition proceedings and final decree; and obviously all of the beneficiaries under Mrs. King's Will were in privity with her and her representatives.

The statement that Mrs. King's heirs are necessary parties to a suit involving title to real estate under Article 1982 of Texas Revised Statutes, and that her executors and trustees alone could not bind the heirs, cannot be sustained under the law of Texas.

Article 1982 of Texas Revised Statutes provides that "In every suit against the estate of a decedent involving the title to real estate, the *executor or administrator,* if any, and the *heirs* shall be made parties defendant." (Italics supplied.) But there is nothing in the statute about *"trustees."*

Petitioners have already cited *Village Mills Co.* v. *Houston Oil Co.,* 186 S. W. 785 and *Lipsitz* v. *First Natl. Bk.,* 288 S. W. 609 which hold that a decree binding upon a trustee with title *also binds all beneficiaries under the trust in a partition suit,* even though the beneficiaries are *not* made parties thereto. We also have pointed out that the Circuit Court of Appeals held that the residuary trustees had power to enter into the Humble 1933 leases, which could only have been upon the theory, acquiesced in by all of the respondents, that the beneficiaries were in privity with the residuary trustees and were bound by the residuary trustees' actions in relation to the title to the minerals, even though they did not themselves join therein.

The cases cited by respondents construing Article 1982 are in no way in conflict with our views.

Equally ineffective are the cases holding that beneficiaries of a trust or will are necessary parties in a suit to *construe* the same. The Tule partition decree did not *construe* either Mrs. King's Will or the mineral trust. The construction of these documents not being involved in the Tule case, petitioners certainly are not in the attitude of asserting that the Tule partition decree was *res judicata* as to the meaning, terms or effect of either Mrs. King's Will or mineral trust.

Respondents cite (p. 8) three cases holding that *owners of record* are not "unknown owners" or "unknown

heirs'' within the meaning of the Texas statute on publication service. The beneficiaries were *not* owners of record, and therefore *were* ''unknown owners.'' Kleberg as mineral trustee was *the only record owner* of the minerals after the March 1, 1919 Mineral Trust had been recorded, eleven years before the Tule partition decree was rendered on July 21, 1930; and the testamentary trustees under Mrs. King's Will were *the only record owners* of the ''surface'' lands in the Tule Grant after formal probate of Mrs. King's Will in 1925. This was the situation when the Tule partition decree was entered on July 21, 1930. These cases, therefore, cannot assist the respondents. ''Unknown owners'' have always been deemed to be those who are *not owners of record* in the chain of title to the land.

Respondents again urge that the Tule partition decree did not adjudicate the effect of, supply any of the defects in, or state any term for, the mineral trust. All of this is admitted by petitioners. The Tule decree adjudicated the fee simple title to 127,000 mineral acres in Kleberg as mineral trustee under the mineral trust; and it left to other litigation the determination of the meaning, terms and effect of the mineral trust as between the several beneficiaries thereunder.

(d) Finally respondents say that the effect of the Tule decree was to vest in Kleberg as mineral trustee ''merely the naked legal title without any power of disposition,'' ''all of the remainder of the title to the 29/32 mineral interest'' being vested in the testamentary trustees.

There is not the slightest foundation in the language of the Tule partition decree to support this contention. The Tule partition decree squarely adjudicated the fee simple

title to the 127,000 mineral acres to be owned and held by Kleberg as mineral trustee (R. 514-7), and perpetually enjoined and restrained all other persons from asserting "any right or title acquired prior to the date hereof" (July 21, 1930) (R. 515). The decree likewise adjudicated clear fee simple title to the "surface" lands ("minus" the minerals) in the seven residuary trustees under Mrs. King's Will "and those hereafter claiming or to claim by, through, or under them," likewise perpetually enjoining and restraining anyone from asserting any adverse right or title thereto.

Whether the mineral trust was valid and active, and was therefore not "dry," was not adjudicated by the Tule partition decree. The Record plainly shows on this point that Kleberg as mineral trustee conducted a most active trust between 1919, when the mineral trust was created, and 1925 when Mrs. King died. He made over two hundred (200) mineral leases during those six years, all with Mrs. King's knowledge, consent and approval. The mineral trust was anything but "dry"; indeed it was extremely active. This, however, is beside the question as to the effect of the Tule partition decree as a decree *in rem* establishing the fee simple title to the 127,000 mineral acres in the mineral trustee, and its binding effect upon the world as *res judicata* of all other adverse claims therein.

In conclusion petitioners urge that the very nature and number of the respondents' attacks upon the Tule partition decree serve rather to strengthen its validity than to weaken or impair the same.

2. The continued existence of the mineral trust after Mrs. King's death.

Respondents appear to have ignored the effect of the Tule partition decree in 1930 as an *estoppel by judgment* and its consequent impeachment of the contradictory holding of the Circuit Court of Appeals that the mineral trust had previously terminated in 1925. Apparently respondents agree with our contention that if the Tule partition decree were valid and effective to vest the fee simple title to the 127,000 mineral acres in Kleberg as mineral trustee in 1930, it must have been equally effective as an *estoppel* against the trustees under Mrs. King's Will, and all of the ultimate beneficiaries who were in privity with the trustees, to deny the continued existence of the mineral trust to 1930 and thereafter for the "full term of FIFTY (50) YEARS from this, the First (1) Day of March, A. D. 1919."

This brings us to the second question considered in the respondents' brief: Did Mrs. King's Will name the beneficiaries to take under the mineral trust, thereby preventing the termination of the mineral trust for want of beneficiaries on Mrs. King's death in 1925?

Respondents have ignored our discussion of the error committed by the Circuit Court of Appeals in refusing to follow the Texas law of severance in regard to minerals, and in holding that the mineral trust terminated on Mrs. King's death for failure of Mrs. Kings' Will to pass the beneficial interest under the mineral trust.

All that respondents say on this subject is that the Circuit Court of Appeals "correctly held that the mineral trust was not in existence at the time of her (Mrs. King's)

death." Respondents then proceed to discuss the question as to whether the mineral interests were real estate and whether they passed under the specific devises of land or as residuary property under Mrs. King's Will.

The issue as to which one of the various clauses of Mrs. King's Will may have disposed of her mineral interests is completely irrelevant to this case if the Will in any one or more of its clauses designated the beneficiaries under the mineral trust. In other words, the mineral trust survived the death of Mrs. King if beneficiaries were named in the specific devises, as well as if they were named in the devises of residuary property. Respondents say that the Will passed the mineral interests under the specific devises, rather than the residuary devises, and add that the Will did not purport to designate any *use or purpose* under the mineral trust. With this proposition as to uses and purposes petitioners are in complete agreement. The uses and purposes of the mineral trust were set forth *in the mineral trust* and were not meant to be found in Mrs. King's Will. *Only* the beneficiaries were to be found there.

It is certain that Mrs. King retained under the mineral trust the right to designate in her Will the beneficiaries under the mineral trust. The mineral trust plainly says so. Since all parties agree that Mrs. King's Will was effective to dispose of her entire mineral interests, it follows that whether such disposition was made in the specific devises or whether it was made in the residuary devises and bequests is immaterial to the mineral trust's survival. In either event the mineral trust survived Mrs. King's death.

We conclude that the Circuit Court of Appeals clearly erred in failing to follow the law of severance established by the decisions of the Texas courts and confirmed by opinions in this Court which are cited on page 27 of our Petition and which permitted Mrs. King to trustee her minerals and retain the right to name the beneficiaries under her mineral trust in her Will, as in the case of any other property.

3. The Humble 1933 Leases committed waste and extended beyond the trust term.

Finally respondents make no effective effort to justify the Humble 1933 mineral leases against our showing that they extended 18½ years and on in perpetuity beyond the end of the 10-year residuary trust under Mrs. King's Will. Before considering this matter, however, we consider the issue as to whether the Humble 1933 leases committed waste of the minerals in the trust estate.

Respondents in the effort to justify these leases and to avoid the charge of waste, state on page 11 of their Brief as follows:

> "The undisputed evidence showed that during her (Mrs. King's) lifetime the lands had been leased for mineral development several times and many wells had been drilled and *minerals actually produced.* Thus the land having been devoted to mineral development by the testator, even a life tenant could commit waste of the minerals under Texas decisions." (Italics ours.)

No Record references are given to support the foregoing statement that "minerals (were) actually produced" on Mrs. King's land in her lifetime. The Record shows conclusively that *not one drop of oil was ever produced on Mrs. King's ranch or other lands prior to her death* on March 31, 1925.

The Record clearly shows (R. 3096) that the only minerals actually produced on the King Ranch prior to 1935 were from the following three wells, all of which were both *commenced* and *completed* after Mrs. King's death, as follows:

King Well No. 2 commenced on September 20, 1925 and completed on December 8, 1925 at a depth of 2,312 feet as a producer.

Cross-State Well No. 2 commenced on May 3, 1925 and completed on September 26, 1925 at a depth of 2,123 feet as a producer.

Cross-State Well No. 3 started on February 8, 1926 and completed on April 5, 1926 at a depth of 2,121 feet as a producer.

Humble Oil & Refining Company, Respondent, which drilled each of the foregoing wells, produced 9,591.75 barrels of oil from King Well No. 2 and 28,802.04 from Cross-State Wells Nos. 2 and 3, or a total of 38,393.79 barrels, *all of which production was obtained after Mrs. King died.* Subsequently other production was had from the King ranch lands by Humble Oil & Refining Company as lessees under the Humble 1933 mineral leases *after the termination of the 10-year trust period under Mrs. King's Will.*

Thus it conclusively appears that respondents' argument that, because Mrs. King had developed minerals in her lifetime, "even a life tenant could commit waste of the minerals under Texas decisions" *cannot be sustained in this case,* because Mrs. King did *not* develop any oil or other minerals on any of her properties whatsoever during her lifetime.

As to the powers of the trustees under Mrs. King's Will to commit waste by leasing the minerals when the same was unnecessary in order to pay the small monthly annuities provided for her descendants during the 10-year trust period, respondents have affixed as an appendix to their Brief a copy of the Second Opinion rendered by the Supreme Court of Texas in the case of *Avis* v. *First National Bank of Wichita Falls* which was rendered on July 21, 1943 after our Petition for Certiorari was filed.

Even this Second Opinion of the Supreme Court of Texas in the *Avis* case is not final, for a Second Petition for Rehearing has been filed therein, and until the Texas Supreme Court shall act thereon the ultimate decision in that case will not be finally made known. Copies of the Second Petition for Rehearing in the *Avis* case are filed with this Reply Brief. Under the Second Opinion of the Texas Supreme Court, it is impossible to know what position the Texas courts will ultimately take on the important question whether a trust instrument granting a trustee or attorney in fact "the naked power to sell land" (as distinguished from the power to make mineral leases) "would give the trustee or attorney in fact the authority to execute an oil and gas lease upon such land," for the Texas Supreme Court there said: "On that question we express no opinion."

However this question may finally be decided, the respondents make no effective effort to meet petitioners' objection to the Humble 1933 leases that they extended 18½ years and on in perpetuity beyond the 10-year trust period.

Respondents completely ignore the cases cited in our Petition (pp. 39-40), which hold that *under Texas law*

and the common law generally the mere *general* power to lease or sell the trust estate does not give the trustees the *special* power to lease or sell minerals or other realty upon royalties, rentals or installments payable for 18½ years and possibly on in perpetuity *beyond the termination of the trust.*

Respondents cite *Greene* v. *Robison,* 8 S. W. (2) 655 and *Starke* v. *Guffey Petroleum Company,* 80 S. W. 1, as authority for the proposition that the trustees had the power to make mineral leases for a 20-year primary term. Neither of these cases had anything to do with the subject for which they are cited. *Greene* v. *Robison* held that the so-called Texas Relinquishment Act permitting the State of Texas to lease its school lands was valid under the Texas Constitution.

Starke v. *Guffey* held that a corporation organized under the Texas Corporation Act to conduct mineral operations and own mineral property had the power to enter into mineral leases. The interpretation of the Texas Statutes and Constitution has nothing whatever to do with the common law of trusts forbidding the making of long-term leases or installment sales *payable beyond the end of the trust term.*

Respondents argue, as petitioners anticipated, that the Humble 1933 mineral "leases" were "in fact *sales* of a fee determinable estate in the realty," and that the *power to sell* includes the power to make mineral leases, "since that is the usual and proper way to *sell* mineral rights," citing *Ehlinger* v. *Clark,* 8 S. W. (2) 666, and *Theisen* v. *Robison,* 8 S. W. (2) 646. Both of these decisions, like the case of *Greene* v. *Robison,* involved interpretations of the Texas Constitution and had no possible relation

to or connection with the general trust law forbidding the making of *leases or sales extending beyond the period of the trust.*

Antictipating that the respondents would contend that the Humble 1933 mineral leases were in fact *sales* and not true *leases,* we showed in our Petition that whether the transaction be termed a lease or a sale is irrelevant, the bar of the law of trusts being against *any transaction which extends beyond the trust term* and which is not fully consummated within it. We cited the Texas case of *Wisdom* v. *Wilson,* 127 S. W. 1128 as conclusive on this point, because it held that a trustee with discretionary *power of sale* had no power to enter into a contract *to sell real estate upon deferred payments extending beyond the termination of his trust.* The Texas court squarely held that this sale was invalid because "the power to sell land does not of itself imply an authority to sell on credit. The presumption is that the sale should be made for cash." This case conclusively demonstrates that the Humble 1933 mineral leases, whether they be considered as continuing *sales* or *leases,* were unauthorized under Mrs. King's Will.

Petitioners therefore pray that this Court will grant the Writ of Certiorari heretofore prayed herein to review the decree of the District Court as affirmed by the Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Of Counsel.

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